

secured thereby; and that Gay was never, after plaintiff learned of Bentley's prior mortgage, in solvent circumstances so that plaintiff could recover from him.

Held, following the principle laid down in *Brown v. McLean*, 18 O.R., 533, and *Abell v. Morrison*, 19 O.R., 669, that the plaintiff was entitled to a first lien or mortgage to the extent of the Primrose mortgage which he had paid off, and that the question of his right so to be subrogated was not *res judicata* by the judgment of Maguire, J., which was merely a direction for the guidance of the Registrar, and did not and could not decide the equitable rights of the parties, nor by the foreclosure order, for the claim now is under the Primrose mortgage, which was not subsequent but prior to the mortgage foreclosed and consequently could not have been affected by the foreclosure order; and distinguishing *McLeod v. Wadland*, 25 O.R., 118, that the plaintiff was not precluded by his laches from enforcing his right to subrogation, there having been no excessive delay, nor any depreciation in the value of the property, nor any material alteration in the position of the parties.

Held, that the plaintiff was entitled under s. 108 to recover out of the assurance fund for the balance of his claim, viz., \$193 and interest, and that it is not necessary that he should have been deprived of land or of some estate or interest therein (the case of *Oakden v. Gibbs*, reported in 8 Victoria Law Reports, not being analogous, the reading of the Victorian Act being different), the proper construction of s. 108 making it read in effect:

"(1.) Any person sustaining loss or damage through any omission, mistake or misfeasance of the Registrar or of any of his officers or clerks in the execution of their respective duties under the provisions of this act, and

"(2) Any person deprived of any land or of any estate or interest in lands by the registration of any other person as owner of such land, or by any error, omission or misdescription in any certificate of title, or in any entry or memorial in the registrar, and who by the provisions of this Act is barred from bringing an action of ejectment or other action for the recovery of such land, estate or interest, may in any case in which the remedy by action for recovery of damages as hereinbefore provided is barred, bring an action against the Registrar as nominal defendant for the recovery of damages, &c.," and that the words "remedy as hereinbefore provided is barred," do not refer, as was contended on behalf of the Registrar, merely to ss. 104 and 105, but to all the provisions of the Act preceding s. 108, including s. 32, but for which section an action might be brought against the Registrar personally, and it is not necessary to show that all remedies direct or indirect have been barred, but it is sufficient to show that the principal remedy, viz., that against the Registrar, has been barred.

Held, also, that the endorsement on the certificate of title of the memorial of the plaintiff's mortgage was equivalent to a certificate by the Registrar that there was no prior encumbrance affecting the land other than those appearing on the certificates of title prior to the plaintiff's mortgage, and that the plaintiff was entitled to rely on such certificate.

Held, also, that even if there had been a binding agreement on the part of Bentley to purchase plaintiff's mortgage, plaintiff was not bound to proceed on it, nor would his failure to do so prevent him from recovering against the assurance fund.

Subsequently on an application for distribution of costs,

Held, that the Registrar should pay plaintiff's general costs of suit and that defendant Bentley should pay the costs of the plaintiff and the Registrar that had been caused by reason of Bentley's defence.

C. F. P. Conybeare, Q.C., and *G. S. McCarter* for plaintiff.

P. McCarthy, Q.C., and *Horace Harvey* for defendant Bentley.

James Muir, Q.C., and *C. C. McCaul*, Q.C., for the Registrar.